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JAPAN'S COMPETITION POLICIES

Summary

Antimonopoly laws are sometimes called economic constitutions because of their potential to fundamentally order economic activity. Japan's law bears American fingerprints, having been enacted in 1947 during the U.S. occupation of Japan. Forty years later, as competitive conditions in Japan assume more urgency in its relationship with the United States, the role of Japan's competition-enhancing policies -- and policies that deliberately limit competition -- is more important than ever. The new emphasis on the widely acknowledged inefficiencies and price discrepancies in the distribution system and elsewhere in Japan perhaps should give the doctrine increased relevance. Yet enforcement of the Antimonopoly Law shows little sign of becoming more vigorous. However, the Japanese legislation, at a minimum, has not prevented, and even may have helped foster, the vigorous competition in many parts of the economy that has been a key to Japan's prosperity.

Why Antitrust?

Economic policymakers at any given time are involved constantly in two operations: doing what they can to make the total output of the economy as large as possible -- baking the largest economic pie -- and slicing the pie in a way that creates the greatest public good. Many, if not all, initiatives have both effects. For example, a policy of increased public spending to combat unemployment may succeed both in reducing unemployment, which in turn increases the size of the economy (the pie), and in redistributing income (the

slices). The formerly unemployed get a larger fraction and those on fixed incomes may get a smaller piece if inflation resulting from the expansionary policy erodes real income.

More explicitly than many other policies, an antimonopoly (antitrust) focus contains both objectives. Briefly stated, antitrust laws attempt to limit economic power in the hands of those who are judged to have the potential to exercise monopoly power. To the extent they are successful:

- They reduce the prices that monopoly-like firms are able to charge. In the absence of a law, such firms could charge substantially in excess of what it costs them to produce a good or service. The relatively high price will work to limit sales. Consumers would prefer a larger output at a lower price, but the monopoly-like firm would not offer that choice voluntarily. An antimonopoly law compels firms to offer consumers that option. Even though the firm would lose profits, its loss is more than offset by the consumers' gains and ripple effects elsewhere in the economy. The pie gets larger.

- They redistribute the economic pie. The monopoly-like firm loses and its customers gain, with smaller gains and losses to other firms and consumers. Sometimes, however, large firms may wield economic power and hold disproportionate wealth without necessarily charging monopoly-like prices. A large firm with a tiny fraction of sales in a wide variety of industries is an example. Even in the absence of high prices and reduced quantities, antitrust laws sometimes have been invoked to reduce concentrations of economic power and wealth. Their use for this purpose is more controversial among economists than the application of such laws to reduce monopoly-like high prices.

These two goals -- reallocation of resources and redistribution of wealth or income -- are fundamental but may be masked by other provisions of antitrust laws. For example, the laws may attempt to help consumers to evaluate the real price of a good by compelling the seller to be truthful about the price or the characteristics of the product. Many such antitrust provisions fall under the rubric of "fair trade practices" and usually involve protection against perceived inequality of economic power or information.

Lack of competition among firms, then, is a powerful factor influencing the need for antitrust laws. However, lack of competition is neither necessary nor sufficient. If other objectives are important -- such as reducing inequalities of wealth, income or economic power -- then it may not be a necessary condition. A law that is badly administered, for example, going after competitive firms and ignoring those that charge excessively high prices, may do more harm than good, even in the presence of anticompetitive conditions.

Competitiveness and Concentration in Japan

Despite these qualifiers, competition or the lack thereof is clearly central to a discussion of the need for antitrust laws. The extent of competition, however, varies considerably by industry in Japan, as does the appropriate way of measuring it.

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In a few fields determining the extent of competition in Japan is easy: there isn't any. For example, a single firm -- Nippon Telegraph and Telephone Corp. -- runs local telephone service in any given locality and one governmental organization provides most postal services nationwide, in both instances paralleling practice in the United States. In other cases assessing the extent of competition is almost as simple. Many companies or individuals may coexist in an industry without really competing if the firms have virtually all the dimensions of competition set for them by a government organization. Japanese insurance companies are examples.

Most other cases, however, are far more difficult. In many manufacturing and nonmanufacturing industries government interference is minimal. However, these same industries are dominated by relatively few firms that are aware they could increase profits if they raised prices and acted like a single-firm monopoly. Of course, recognizing this fact and attaining the desired state of affairs are two different things. One impediment, for example, is that jointly fixing prices often is illegal under antitrust laws, a subject addressed below.

But even in the absence of such laws, firms have incentives to break any agreement reached. For example, if a hypothetical group of firms agreed by consensus that a price of $50 would maximize profits, one firm may find it could increase its sales and its own profits -- albeit reducing the group's total profits -- by charging $49. Once group discipline is broken, the price could spiral downward toward the level that would have prevailed in the absence of an agreement.

Just as families with only two children may face problems of sibling rivalry, an industry with two firms may be characterized by fierce competition. Eastman Kodak Co. and Fuji Photo Film Co., Ltd. dominate the American and the Japanese photographic film markets, yet compete vigorously at least in the introduction of new products. But generally the problem of discipline within the group multiplies at least in proportion to the number of participants, just as it does in a family with children.

In some cases many firms may compete in the national market, although particular companies may dominate in specific geographic regions. For example, if a small town has only one department store, but another town a few miles away has a branch of a different chain, deciding whether or not the department stores effectively are monopolies is not clear-cut since customers have the choice of traveling only a few miles to find a competitor. As this example also illustrates, defining the industry is not always obvious either. Customers have many choices besides department stores at which to buy men's clothing, for instance.

Keeping these qualifiers in mind, many -- but not all -- experts agree that the probable extent of competition can be determined approximately by looking at the number of firms producing a particular product; situations where a small number of firms predominate are judged probably less competitive. (Those who reject this notion tend to believe that competition is fierce unless restricted by government interference.) Where regulation or market definition are not major factors, the most common measurement of noncompetitiveness among firms is called the production concentration ratio, derived by dividing the production of the largest firms in the industry by total industry output. The

concentration ratio for ordinary mail in Japan is 100 percent but is close to zero for rice farming, with its hundreds of thousands of farmers. Most industries are obviously far from either extreme (see Table 1). A large number of participants, however, does not guarantee a low concentration ratio. Japan's Fair Trade Commission estimated in 1984 that the percentage of output accounted for by the three largest firms in Japan's steel industry was 63.4 percent that year, although the number of firms in the industry numbers close to 2,000.

Table 1: Production Concentration Ratios in Japanese Manufacturing, 1984

(percent of output accounted for by three largest firms)

	Number of Products	Simple Average	Weighted Average
Food	43	60.4%	55.3%
Textiles	17	34.4	25.5
Wood and Wood Products	3	19.8	14.4
Furniture and Furnishings	3	42.5	41.4
Pulp and Paper	15	45.5	40.5
Publishing and Printing	3	50.2	52.4
Chemicals	62	58.1	42.5
Petroleum and Coal Products	12	41.5	35.2
Rubber Products	12	59.1	72.5
Leather Products	2	24.1	24.8
Nonmetallic Mineral Products	20	66.1	57.3
Steel	35	67.2	63.4
Nonferrous Metals	15	61.7	46.3
Fabricated Metal Products	16	54.2	43.4
Nonelectric Machinery	65	56.0	53.0
Electric Machinery	66	63.3	56.8
Transportation Equipment	13	69.8	62.9
Precision Instruments	8	77.8	70.2
Other Manufacturing	16	56.2	37.7
Average	420	58.1	51.5

Source: Fair Trade Commission

The figures in the table demonstrate another problem common in concentration measures: aggregating across a number of industries can mask much higher levels of concentration in particular important sectors. In a number of these, the overwhelming proportion of output may be accounted for by more than three companies but still a small number of firms. The automotive industry, part of the transportation equipment category in the table, illustrates these problems. Final assembly of cars is concentrated in nine companies, with Toyota Motor Corp. and Nissan Motor Co., Ltd. dominating the industry, especially in the domestic market.

Another factor in reading concentration ratios is that the figures in the table measure only production in Japan. Exporting firms will have more competition than the concentration ratios indicate to the extent that they face

foreign rivals in overseas markets. These measures also will understate competition to the extent that companies supplying the domestic market have to compete with imports.

To get around these problems, Japan's Fair Trade Commission publishes a second set of concentration measures. The shipments concentration ratio uses as the numerator domestically bound shipments of the firm or firms in question and as a denominator total domestic shipments of Japanese manufacturers plus imports. As such, it is a better indicator of competition in the Japanese market, although this measure is available for far fewer products and for fewer years than the production concentration ratio. As foreign trade has increased in importance for the Japanese economy, the two measures increasingly have diverged, as Table 2 shows. The shipments measure, especially, suggests that competition well may be increasing in Japan.

Table 2: Trends in Concentration, 1975-84

(product-weighted three-firm concentration ratio for 127 products)

	Production	Shipments	Import Ratio
1975	73.9%	71.6%	3.8%
1976	72.9	70.9	4.3
1977	73.3	71.0	4.2
1978	73.4	71.0	4.5
1979	73.0	69.9	4.5
1980	72.4	69.4	4.9
1981	72.4	69.8	4.7
1982	72.4	69.2	5.0
1983	71.7	68.6	5.3
1984	71.5	68.4	6.1

Source: Fair Trade Commission

Other measures, however, show a less clear-cut result. The 10-firm product-weighted production concentration ratio, which allows for the possibility that a relatively large number of companies may be able to act monopolistically, shows a steady post-1973 increase that accelerated in the years immediately prior to 1984.

Finally, all of these measures assign disproportionate weight to the manufacturing sector. Some important nonmanufacturing industries, such as rail and air transportation and telephone service, are much less competitive than all but the most concentrated manufacturing industries, while others, such as retailing, may be more competitive. With services accounting for an increasing proportion of the economy, the government's minimal coverage of it in the calculation of concentration is becoming a more serious problem. Since transportation, wholesaling, retailing and similar services perform the function of delivering manufactured products to consumers, even the existence of relatively competitive manufacturing firms may not be enough to ensure competitive pricing at the retail level.

Finally, even if service sectors such as distribution are competitive as indicated by the presence of large numbers of firms, they may still charge high prices and provide poor service. The inefficiencies in Japan's distribution system arising from entrenched practices and government rules are well-documented (see JEI Report No. 11A, March 17, 1989).

A recent Bank of Japan report hinted at the magnitude of the effect of regulation on prices. Comparing the response to the yen's appreciation of regulated products with those judged to be relatively free of regulation, BOJ found that from the beginning of 1985, before the yen began appreciating, to the end of 1988, when it had stabilized at a much higher level, the domestic wholesale price of regulated goods was virtually unchanged. By contrast, the price of unregulated goods in the domestic market dropped about 15 percent.[1] Overall domestic wholesale prices declined about 9 percent. Even making the heroic assumption that the regulated goods were competitively priced at the beginning of 1985, this analysis suggests that by 1988 they probably were noncompetitively priced.

Antitrust in Japan

As noted earlier, a look at concentration ratios and other measures of competitive potential is incomplete without addressing an important mediating factor: laws and regulations that influence competition directly. While some governmental measures, in effect, may fix prices at high levels, in principle the vigorous enforcement of antitrust laws has the opposite result, affecting the conditions in the previous section in at least three ways.

- The level of concentration itself may reflect the government's previous antitrust activity. Actions to break up concentrated market power are one of the tools of antitrust authorities. In fact, the term antitrust originated in actions to break up monopoly positions in various industries held by trusts (a sort of holding company) in 19th century and early 20th century America.

- Good antitrust enforcement can overcome bad structure. Even if concentrations of market power are allowed to continue, vigorous action against price-fixing can prevent a lot of economic damage.

- Japan's chief enforcer of the Antimonopoly Law, the Fair Trade Commission, can be a force inside government encouraging competition even when it would result in a loss of revenues, influence over an industry or be in conflict with other goals.

On all these counts, antitrust in Japan has been condemned widely as ineffective at best and counterproductive at worst. Perhaps that judgment deserves some perspective.

Antitrust came late to Japan and was an American import. The original Antimonopoly Law was passed under pressure from U.S. occupation authorities in 1947 and incorporated much of then-current American thinking about the proper

[1]Bank of Japan, "Recent Price Developments in Japan," Special Paper No. 174, March 1989, p. 54.

role of antitrust laws. Article 1 expressed the overall objectives of the law:

> This Law, by prohibiting private monopolization, unreasonable restraints of trade and unfair methods of competition, by preventing excessive concentration of power over enterprises and by excluding undue restriction of production, sale, price, technology, etc. through combinations and agreements, etc. and all other unreasonable restraints of business activities, aims to promote free and fair competition, to stimulate the initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the levels of employment and national income and, thereby, to promote the democratic and wholesome development of the national economy as well as to assure the interest of the general consumer.[2]

The Antimonopoly Law and companion legislation of the time were at least partly a consequence of prewar and wartime Japan's concentration of economic power. The most famous groups wielding such power were the zaibatsu, which were believed to have played a major role in World War II. The American occupation authorities were eager to curb the power of the zaibatsu and prevent their reappearance. In the laws they promoted and the actions they took, the occupation officials aimed for nothing less than a total restructuring of Japanese industry. As such, the words of the Antimonopoly Law probably were more revolutionary than the comparable words in the American equivalent, the Sherman Antitrust Act, half a century earlier. In fact, one of the best-known experts on industrial structure in Japan, Masu Uekusa of the University of Tokyo, has said, "The deconcentration measures imposed on Japan during the occupation period were probably the greatest use of government power in modern times to reform industrial organization."[3]

The ink, however, was hardly dry on the antimonopoly measure before revisions began. Both the first major change, in 1949, and the second, in 1953, weakened the law but left intact one important element, the prohibition on holding companies. Holding companies arguably had been the linchpin of the prewar zaibatsu. In 1977, moreover, in the aftermath of the first oil crisis, the law was strengthened significantly.[4]

Most serious American students of economic concentration in Japan believe that the early postwar period at least was characterized by much more

[2]Quoted in Eleanor M. Hadley, Antitrust in Japan (Princeton, New Jersey: Princeton University Press, 1970), p. 121.

[3] Masu Uekusa, "Effects of Deconcentration Measures in Japan," Antitrust Bulletin, Fall 1977, p. 687.

[4]For details of the 1949 and 1953 revisions, see Hadley, op. cit., pp. 197-200. For the 1977 revisions, see "A Decade of the Antimonopoly Act as Amended," FTC/Japan Views, No. 1, January 1988, pp. 6-16. For a brief description of both periods, see Harry First, "Japan's Antitrust Policy: Impact on Import Competition," in Thomas A. Pugel (ed.), Fragile Interdependence: Economic Issues in U.S.-Japanese Trade and Investment (Lexington, Massachusetts: Lexington Books, 1986), pp. 63-67.

Table 3: Violations of Antimonopoly Law Found by Fair Trade Commission, FY 1975-FY 1987

Fiscal Year	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Price-Fixing Agreements	18	21	4	2	12	5	8	10	5	6	3	4	4
Of which, Nonmanufacturing	n.a.	n.a.	n.a.	0	10	1	3	7	1	4	2	2	4
Other Collusive Agreements	6	0	2	0	3	2	0	2	0	0	0	0	0
Unfair Trade Practices	6	10	4	4	4	4	4	6	4	0	7	0	1
Resale Price Maintenance	2	2	0	3	0	0	1	4	3	0	7	0	1
Other Restrictions	1	4	1	1	0	1	1	0	1	0	0	0	0
Refusal to Deal	1	0	2	0	0	3	1	0	0	0	0	0	0
Other	2	4	1	0	4	0	1	2	0	0	0	0	0
Other	0	0	0	0	0	5	1	2	1	1	0	0	1
Total	30	31	10	6	16	14	11	19	10	7	10	4	6

Source: Fair Trade Commission

vigorous competition and decentralization of economic power than the era that preceded it. Furthermore, up to the early 1960s at least, the process was ongoing, with market concentration generally decreasing.[5] While vigorous action against Japanese industrial concentration may have played a major role during the occupation, the Antimonopoly Law assured that the momentum would continue.

Trends in Antitrust Enforcement

The Antimonopoly Law gives Japan's Fair Trade Commission authority to take actions against business practices that the FTC deems to be monopolistic. Table 3 shows the pattern of violations found by the FTC. The mid-1970s were characterized by more violations than either before or after. The number of cases in recent years, however, has fallen to a level far below the average of 34 cases per year between FY 1947 and FY 1972. In FY 1986 and FY 1987 no price-fixing violations by wholesalers were found despite the appreciation of the yen and the likelihood that at least some firms made extraordinary efforts to maintain prices notwithstanding lower yen-denominated costs for their imported products.

System of surcharges - One of the changes introduced by the 1977 revisions to the Antimonopoly Law was a system of surcharges assesssed against violators. The surcharges are based on sales volume during the period in which the violation occurred, with a higher percentage levied in manufacturing than in services. Table 4 shows how these surcharges have varied since their introduction. By the early 1980s the surcharges amounted to billions of yen (and millions of dollars) per year. In fact, in some years the surcharges exceeded the entire FTC budget. For example, the Y3.8 billion ($29.2 million at Y130=$1.00) in surcharges in FY 1981 exceeded the FTC budget of Y2.5 billion ($19.2 million).

Table 4: Surcharges for Illegal Cartels, FY 1981-FY 1987

Fiscal Year	Number of Cases	Number of Firms and Individuals	Amount (millions of yen)
1981	6	149	Y3,759.5
1982	8	170	737.4
1983	10	92	1,466.0
1984	2	5	353.1
1985	4	32	153.7
1986	4	32	275.5
1987	6	54	147.6
Total FY 1977-FY 1987	58	877	9,797.9

Source: Fair Trade Commission

[5]For a summary of these studies, see Richard E. Caves and Masu Uekusa Industrial Organization in Japan (Washington, D.C.: The Brookings Institution, 1976), pp. 26-27.

In recent years the surcharges, like the violations found in Table 3, have diminished dramatically. The FTC argues that the two phenomena are related, saying, "This can be attributed to the restraining effect of the surcharge system, which takes economic sanctions against cartel participants that gain financial benefits from illegal activities. This decline has also resulted from the widespread awareness of the Antimonopoly Act as well as the FTC's publication of various guidelines."[6]

Others believe that the FTC basically caved in to political pressure and eased up on price-fixers and other violators of the Antimonopoly Law. The appreciation of the yen that began in 1985 undoubtedly made some anticompetitive actions more difficult since import competition was more likely. It also may have created more of an imperative for some firms to do what they could to maintain prices and profits even at the risk of running afoul of the Antimonopoly Law.

The sanctions themselves are a drop in the bucket in terms of overall economic activity in Japan. The total amount levied over 10 years is far less than the annual profit of a single large Japanese company, and thus suggests that the deterrent effect, if any, works mainly through the embarrassment of being publicly identified as a price-gouger.

Private action in antimonopoly cases - Private antitrust suits are permitted in Japan but, unlike the American situation, are rare and the settlements very modest. When parties do feel they have been overcharged or otherwise subjected to unfair trade practices, they can attempt to recover damages from the firm or firms in question. The most publicized recent attempt in Japan has involved alleged overcharging for petroleum products in connection with the first oil crisis in 1973-74. In two cases consumer groups eventually settled for relatively small sums of Y128,000 ($985) and Y75,000 ($577) after the cases reached the Tokyo High Court. In another the consumers rejected the proposed settlement of Y235,000 ($1,808) and appealed to the Supreme Court, where they lost. A fourth case, appealed from the Akita High Court, which overturned a lower court decision against the consumers, now is pending before the Supreme Court.

Legal cartels - One of the startling aspects of the Japanese antitrust environment for Americans is the pervasiveness of legal cartels authorized by various statutes and administrative actions. Table 5 shows the major types of "exemption cartels" and how their numbers have varied over the years. The overwhelming majority have been allowed under laws permitting some small and medium-sized enterprises to set up cartels in local markets. As such, they are far less damaging to overall allocative efficiency than the better-known cartels that sometimes have been allowed in major industries, such as shipbuilding and petrochemicals.

The cartels are established for various purposes, a common one being to control the size of an industry's capacity, thereby preventing "excessive competition." Some of the export cartels are an attempt to forestall restrictive actions against Japanese manufacturers. Washington, for example, might extract a promise from Tokyo to limit exports to the United States of a particular

[6]FTC/Japan Views, op. cit., p. 7.

Table 5: Japanese Cartels Legally Exempt from Antimonopoly Law, 1955-88

(as of March 31 of each year)

	General		Trade-Related		Small and Medium Firm-Related	Environment Sanitation Act	Other	Total
	Depression	Rationalization	Import	Export				
1955	0	0	0	14	143	---	5	162
1960	4	9	2	170	370	0	40	595
1965	2	14	2	208	587	122	64	999
1970	0	10	4	214	469	123	66	886
1975	2	0	4	105	511	122	44	788
1980	1	1	4	66	267	122	30	491
1981	1	1	4	62	268	122	31	489
1982	3	0	3	57	290	122	28	503
1983	2	0	2	56	263	123	25	471
1984	0	0	2	56	231	124	23	436
1985	0	0	2	56	235	123	24	440
1986	0	0	2	57	226	116	25	426
1987	0	0	2	55	224	76	25	382
1988	2	0	1	53	185	53	16	310

Source: Fair Trade Commission

product. In the absence of a specific arrangement to the contrary, the typical Japanese exporter would want its competitors to cut their shipments, with it being able to reap the benefits of the resultant higher prices without suffering the disadvantage of a smaller volume of shipments. To get around this free-rider problem, a cartel is necessary. Mitsuo Matsushita, a law professor at the University of Tokyo, says that the majority of major trade cases with the United States have been handled by means of export cartels organized by the Ministry of International Trade and Industry.[7]

Some analysts, particularly in the United States, have argued that cartels set up to aid a specific industry have been an integral part of Japan's industrial policy, tilting the advantage to that country's manufacturers in international competition. This view -- either of the role of cartels or of industrial policy more generally -- is far from universally accepted even among American specialists on the Japanese economy. Space limitations preclude considering this argument in detail.[8] However, some general observations concerning this argument appear appropriate.

- Most legal cartels have no international dimension involving exports or competition with imports. Many of the cartels involve small businesses providing services locally.

- Organizing a cartel to promote exports normally is considered illogical. Actions to raise prices hardly seem like the appropriate way to penetrate export markets. In fact, foreign critics usually argue that Japanese firms have cut prices excessively. The coexistence of a cartel with price-cutting hardly establishes the cartel as the cause of the low prices. More likely the cartel is an effort to prevent the price-cutting, as in the case of export cartels organized in response to U.S. pressure.

- Industry-specific cartels involving large firms have been declining in number rather dramatically. In June 1988 the Depressed Industry Law, first enacted in 1978, was allowed to lapse and, with it, the ability of manufacturers of 26 products to engage in coordinated actions, including concerted investment and joint marketing (see JEI Report No. 30B, August 5, 1988).

[7]Mitsuo Matsushita, BYU Law Review, No. 2, 1987, p. 569.

[8]See Edward J. Lincoln, Japan's Industrial Policies (Washington, D.C.: Japan Economic Institute, 1984) and Iyori Hiroshi, "Antitrust and Industrial Policy in Japan: Competition and Cooperation" in Gary Saxonhouse and Kozo Yamamura, (ed.), Law and Trade Issues of the Japanese Economy (Seattle, Washington: University of Washington Press, 1986), pp. 56-82. The use of cartels to promote economic growth is discussed in Gary Saxonhouse, "Industrial Restructuring in Japan," Journal of Japanese Studies, Summer 1979, p. 306, and in Kozo Yamamura, "Success That Soured: Administrative Guidance and Cartels in Japan," in Kozo Yamamura (ed.), Policy and Trade Issues of the Japanese Economy (Seattle, Washington: University of Washington Press, 1982), pp. 77-112. Saxonhouse finds the proposition that cartels have aided the process of discarding so-called sunset industries illogical. Yamamura suggests that, while legal cartels may have helped expansion during some phases of postwar growth, they have outlived their usefulness.

A new form of legal cartel has surfaced very recently in connection with the 3 percent consumption tax imposed on virtually all transactions in Japan beginning April 1. The law providing for the tax also permits the organization of cartels to standardize within an industry group how to designate the tax in pricing and how to shift the burden of the tax to consumers. The Fair Trade Commission reportedly fought the proposals inside the government and won some concessions that limited the circumstances under which the cartels would be legal.

Firms of any size can engage in the first type of cartel, but the cartel is supposed to limit itself to such discussions as whether to erect a banner in stores saying that the tax is included in the marked prices or to explicitly indicate the amount of tax on each item. The second cartel type involves discussions about measures that make sure manufacturers or retailers do not end up paying the tax. A possible discussion topic under this type of cartel would be whether to reduce serving sizes in a restaurant 3 percent or (alternatively) raise meal prices 3 percent. This kind of cartel is supposed to be limited to small firms and is prohibited from raising effective prices more than 3 percent by, for example, boosting prices 3 percent and reducing beverage sizes 3 percent.

Permission for both types of "concerted measures" is due to expire March 31, 1991. Japanese entrepreneurs seem to have leaped at the chance to organize special groups under these provisions, putting together hundreds of cartels throughout Japan. Whether or not the measures will be effective in obtaining their stated objectives remains to be seen. Skeptical American analysts probably would expect these provisions to lead to price-fixing exceeding that permitted for purposes of the "smooth" implementation of the new tax. Whether or not this will happen is not yet known, although the FTC already is investigating some situations where it believes this may have occurred.

In addition to legal cartels, the Japanese government prevents competition through the use of regulatory authority. In 1987 the FTC estimated that approximately 40 percent of Japan's economy was subject to substantial government intervention through legal cartels and other regulations. A significant percentage of the restrictions -- perhaps more than half -- were other than legal cartels. In addition to cartels, the restrictions included explicit entry or exit regulations and clear-cut price and output directives. An even higher percentage would have been obtained if informal measures, such as administrative guidance, had been included.

Mergers - If firms operating in the same industry combine, the chances increase for occurrences of anticompetitive activity. For this reason close monitoring of mergers, and action against those believed to hinder competition, are potentially important weapons available to antitrust authorities. Tokyo, however, has taken little action against mergers, with 1968 being a dramatic exception. That year two important cases confronted the FTC. In the first, involving the proposed merger of Yawata Iron and Steel Co., Ltd. and Fuji Iron and Steel Co., Ltd., MITI effectively countered the FTC's opposition and prevailed. The other, a proposal to merge the three largest paper companies into a concern that would control 60 percent of the market, was dropped in anticipation of the FTC's objection.

This mixed result may have discouraged the FTC from pursuing this route toward maintaining competition. In recent years the agency has confined itself

to placing conditions on mergers, such as requiring the divestiture to a third party of parts of a combined firm that would have excessive market power. But even this power has been little used.

A defender of the FTC could note, however, that there have been few mergers to match those proposed in 1968. While mergers have been on the upswing in Japan in recent years (see JEI Report No. 31B, August 12, 1988), so far they usually have involved combining relatively small firms or organizational changes within what are already de facto single enterprises, as when a sales subsidiary is combined with its manufacturing parent.

The contrast with the United States in this regard is striking. For example, both countries face turmoil in their financial markets as deregulation spreads. U.S. banks have responded by numerous mergers. While most have involved small institutions, some, such as the recent one between Irving Trust Co. and Bank of New York, have involved major American banks. The largest financial merger in Japan in the 1980s -- between Sumitomo Bank, Ltd. and Heiwa Sogo Bank, Ltd. in 1986 -- was nowhere near the same magnitude. (Japanese banks, of course, have actively acquired banks in the United States, but these well-publicized cases have been dwarfed by other bank mergers in this country.) Similarly, the recent monumental mergers in the U.S. food manufacturing industry, such as Philip Morris Inc.'s acquisition of General Foods Corp. in 1985 and Kraft Inc. in 1988, have no parallel in Japan.

International Aspects of Antitrust

As noted earlier, international trade has dramatic effects on competitive conditions. Until the late 1960s American automakers often were singled out as prime candidates for antitrust action on the grounds that the Big Three (General Motors Corp., Ford Motor Co. and Chrysler Corp.) dominated the industry and appeared to be acting as de facto monopolists. With Japanese makers such as Toyota Motor Corp. and Honda Motor Co., Ltd. now grabbing shares that collectively put them well ahead of Chrysler and about even with Ford in the U.S. automotive market, few now argue that the market is noncompetitive.

But if international trade can liberate market forces, antitrust authorities also believe some kinds of international activities can reduce competition. U.S. antitrust authorities in the past have worried that American firms would use agreements with foreign firms to stifle competition worldwide. In an effort to keep noncompetitive actions abroad from contaminating competition in the domestic market, U.S. antitrust law has been interpreted to prevent the inclusion of restrictive clauses in agreements with foreign producers.

In the realm of technology licensing, U.S. firms have argued that both American and Japanese law have slowed them down in the Japanese market. Consider, for example, the case of a U.S. company that licenses a Japanese firm to use its technology in Japan. To prevent competition with itself, the American business might try to insert a clause in the contract to prevent the Japanese firm from selling the resulting product in China. U.S. antitrust authorities might feel such a contract eventually could hurt competition in the United States and take action to prevent such restrictive clauses. But if the American firm somehow convinces U.S. officials to permit such a clause, it still has to deal with Japan's FTC, which might see the potential for anticompetitive

behavior at home. Recent changes in U.S. law and antitrust philosophies plus proposals to change Japanese practice have had the effect of reducing the number of complaints by American firms on this score.

As the technology licensing case illustrates, U.S. antitrust law consistently has been interpreted to have a broad reach. In 1982 a Japanese trading company (Mitsui & Co., Ltd.) even was found guilty under U.S. law for stifling competition in Indonesian logs and lumber on the grounds that the price-fixing could affect competition in the United States even though the Japanese firm did not sell the Indonesian products here.

But the best-known attempted use of U.S. antitrust law against Japanese firms involved a 16-year battle in which Zenith Electronics Corp. and National Union Electric Corp. took on Japan's major consumer electronics makers (see JEI Report No. 18B, May 8, 1987). The U.S. companies claimed that the Japanese firms used a variety of means, including dumping and predatory pricing in the 1960s and 1970s, to try to drive them out of the television business. Zenith and NUE eventually lost. U.S. courts based their decision in part on the unlikelihood of predatory pricing by means of a cartel that artificially lowers -- rather than raises -- prices.

A more recent case involves polysilicon, used in the production of silicon wafers that, in turn, are used to make integrated circuits. Echoing similar complaints by Zenith almost two decades ago, Union Carbide Corp. has charged that Japanese manufacturers have attempted to form a cartel to manipulate world prices <u>downward</u>. It claims that this action is intended to protect the profitability of silicon wafers, which the Japanese companies also produce, and reduce Union Carbide's ability to manufacture the product at a profit (see JEI Report No. 40B, October 21, 1988). This case eventually may hinge on unrelated questions, but to the extent that the predatory pricing charge turns out to be important, Union Carbide might benefit from new intellectual opinion concerning that practice. In contrast to the situation when the Zenith case finally was decided, an increasing number of economists find predatory behavior a profit-maximizing strategy in some situations, particularly if, as in this case, it involves predatory investment.[9]

In contrast to U.S. law, Japan's Antimonopoly Law does not reach activities taken outside the country even if they affect competition domestically. However, international trade and Japanese antimonopoly law still interact. American soda ash producers argued at the start of the 1980s that Japanese producers had formed a cartel to limit imports from the United States. In April 1983 Japan's FTC found the arguments convincing and ordered the Japanese firms to discontinue the practice and, specifically, to offer the liberal use of a port terminal for offloading soda ash, among other measures. In a November 1987 report the FTC found that noncompetitive practices had ceased, although some American observers are skeptical.

Antitrust law -- designed to protect competition -- and other trade law and administrative actions -- which may be protectionist -- sometimes conflict.

[9]For a discussion of this research, see Charles W. McCall, "Predatory Pricing: An Economic and Legal Analysis," <u>Antitrust Bulletin</u>, Spring 1987, pp. 1-59.

In the United States Terry Calvani, a member of the Federal Trade Commission, has argued that antitrust law should be brought to bear in dumping cases, an argument that, if convincing, would make the U.S. firm filing dumping charges the guilty party.[10] He maintains that dumping charges often are really efforts by U.S. firms to limit competition and, as such, should come under the purview of antitrust statutes.

A similar argument has been made in Japan. In the settlement of a rare case involving charges of dumping in the Japanese market, Korean knitwear manufacturers agreed to set minimum prices (see JEI Report No. 7B, February 17, 1989). One of Japan's largest daily newspapers, Yomiuri Shimbun, pointed out in an editorial that this action, which was taken at the request of Japanese competitors, appears to be in violation of Japan's Antimonopoly Law.[11]

Whither Antimonopoly Policy?

Competition policy has had its ups and downs in postwar Japan. Quite often antimonopoly activism appears linked to broader reform efforts, as it was in the mid- and late 1970s, when the Antimonopoly Law was strengthened as part of the response to the 1973-74 oil shock, actions by oil companies during the crisis and the Lockheed Corp. bribery scandal. So far, however, there is no evidence that the current political influence-buying scandal rocking Tokyo, the most severe since that time, will have a similar effect.

In the United States antitrust has had a hard time in the 1980s. The Federal Trade Commission, one of two U.S. government agencies that administer American antitrust laws, suffered highly publicized budget indignities during the early years of the Reagan administration. The scope of antitrust activities at the FTC and the Justice Department has narrowed significantly. In part this trend reflects a belief that public actions, rather than private ones, promote most problems arising from a lack of competition. In this connection, government restrictions on competition in financial services, to cite one example, have eased considerably.

The perceived weakness of antitrust enforcement in Japan may have played a role in cooling the ardor for traditional antitrust activities in the United States. Japan has been successful, the argument goes, by largely ignoring antimonopoly policy and, not infrequently, acting in ways directly contrary to conventional American wisdom concerning competition. In fact, some analysts would argue that Japanese firms have done well in competition with U.S. companies for this reason. Taking the argument a step further, this group would support a further weakening of American antitrust laws, reversing in some cases decades of antimonopoly policy in the United States.

This argument appears to misunderstand some aspects of competition in Japan. For one thing, Japan, for all the shortcomings of antimonopoly policy, remains, with the postwar policy of zaibatsu dissolution and other restructuring, one of the most important models of massive procompetition policy in

[10]Terry Calvani, "Invocation of United States Import Relief Laws as an Antitrust Violation," Antitrust Bulletin, Summer 1986, pp. 527-550.

[11]Yomiuri Shimbun, February 3, 1989.

history. Arguably, its undeniable economic accomplishments may owe more to the effects of these earlier policies than to recent policies that often have gone in the opposite direction. Furthermore, whatever the merits of the argument in the United States that government, rather than private industry, is the source of practically all barriers to competition, that theory remains unproven as far as Japan is concerned. In other words, antimonopoly policy may have a continuing positive role to play in a wide variety of circumstances in Japan, whether or not it does in the United States.

Many American firms and policymakers appear to see antitrust laws in general as a major nuisance. This view may have blinded them to the potential use of antimonopoly statutes as a means of knocking down barriers in Japan. In other words, they may fail to see the good that such laws can do in Japan because they believe them to be counterproductive in the United States.

Antimonopoly policy has only a small role in current U.S. international economic policymaking, reflecting its diminished status throughout government. U.S. efforts to get Japan to change its distribution system are a possible exception, but in this case access for American firms, rather than competition per se, seems to be the main concern. Rather than reacting to the perceived weakness of Japanese antitrust law by proposing measures that relax U.S. statutes, American officials might enjoy better success if they push an activist antimonopoly policy toward the top of the negotiating agenda with Tokyo. They might be surprised at the positive response.

Conclusion

When U.S. occupation authorities first proposed an antimonopoly law for Japan, many in both countries were highly skeptical that such an alien flower could ever bloom in Japan. After four decades the plant may not be thriving, but it has survived sometimes determined efforts to completely root it out. The vigorous competition among Japanese firms and with their American rivals even may be partly a consequence of the seed planted by American visionaries more than a generation ago. While U.S. firms trying to penetrate the Japanese market often have found the competitive thicket overwhelming, a part of that thicket was planted by Americans.

As the economies of the United States and Japan have become more intertwined, their antimonopoly and trade laws have had an increasing impact on each other. U.S. antitrust laws sometimes have been enlisted in dubious efforts to protect domestic firms against the onslaughts of Japanese competition. Americans have found Japanese antitrust legislation a weak reed to rely on to ensure that they face fair, competitive conditions in Japan. And U.S. trade actions directed against Japanese firms also have harmed competititive conditions in the United States.

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The views expressed in this report are those of the author and do not necessarily reflect those of the Japan Economic Institute.